

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>88-11384</u>
DANIEL T. MORAETES	)	
KATHY B. MORAETES	)	
	)	FILED
Debtors	)	at 2 O'clock & 03 min. P.M.
	Date:	6-9-89

**ORDER**

This Chapter 13 proceeding came before the court for confirmation. Debtors, Daniel T. Moraetes and Kathy B. Moraetes, propose a composition Chapter 13 plan paying the sum of One Hundred Fifty and No/100 (\$150.00) Dollars per month to the Chapter 13 trustee over a period of sixty (60) months to pay all allowed secured claims in full with the balance of payments distributed to unsecured creditors pro rata based upon the amount of their allowed claims. At confirmation, the Chapter 13 trustee projected a dividend to unsecured creditors over a sixty (60) month period of 53.9%. No party in interest objected to confirmation.

Inquiry by this court regarding the confirmation requirements of 11 U.S.C. §1325(a) revealed the following:

This is not the debtors' first bankruptcy proceeding. The debtor's schedules executed under oath states that the husband, Daniel T. Moraetes, filed a Chapter 13 in 1978 and paid out in 1983.

An examination of the records of the Bankruptcy Clerk for the Southern District of Georgia reveals that debtor, Daniel T. Moraetes sought relief under Chapter XIII of the Bankruptcy Act on November 14, 1975, In re: Daniel T. Moraetes, Chapter XIII Case No. 175-434, which case was confirmed December 17, 1975, and dismissed April 21, 1981, based

upon the failure of the debtor to make promised payments. Debtors, Daniel T. Moraetes and Kathy B. Moraetes, sought protection under Chapter 7 of Title 11 U S C., May 19, 1988. The United States Trustee moved for order dismissing the Chapter 7 proceeding and following hearing, this court determined:

1. The debtor's debts were primarily consumer debts within the meaning of 11 U.S.C. §101(7).

2. Debtor's failure to disclose in their schedules postpetition payments of a debt with husband's employer constitutes an act of bad faith. Further the debtor's understated their monthly income and overstated their current monthly expenses, some of which would not qualify as reasonably necessary for their maintenance and support under 11 U.S.C. §1325(b).

3. Granting relief under Chapter 7 of this case would constitute a substantial abuse of the process for which the Bankruptcy Code exists, i.e. to grant a fresh start to honest, unfortunate debtors whose financial state is such that they cannot reasonably be expected to satisfy their financial obligations.

Order dismissing the Chapter 7 proceeding was entered September 16, 1988.<sup>1</sup>

On November 1, 1988, the debtors brought this Chapter 13 proceeding. In spite of the order dismissing the previous Chapter 7 proceeding, the debtors propose a virtually identical budget, reflecting in this Chapter 13 proceeding less disposable income and higher monthly living expenses than in the previous Chapter 7 case. According to the debtor's schedule in this Chapter 13 proceeding, the debtors had a combined income for the calendar year 1987 of Seventy-One Thousand Seven Hundred and No/100 (\$71,700.00) Dollars plus an additional Six Thousand Six Hundred and No/100 (\$6,600.00) Dollars in social security payments received for the benefit of the child of debtor, Kathy B. Moraetes. The two debtors and two minor children reside in the household. In addition, the debtors provide support in the amount of One Hundred and No/100 (\$100.00) Dollars per month to the mother of debtor Daniel T. Moraetes, and Daniel T. Moraetes is obligated to pay child support in the amount of Four Hundred Seventy-Five and No/100 (\$475.00) Dollars per month. The schedules filed by the debtors list a total disposable income into the household of Three Thousand Three Hundred Thirty-Five and 54/100

(\$3,335.54) Dollars per month. The estimated average future monthly living expenses of the family totals Three Thousand One Hundred Eighty-One and No/100 (\$3,181.00) Dollars, thus arriving at the excess of One Hundred Fifty and No/100 (\$150 00) Dollars per month for payment to the trustee. The estimate of average future monthly living expenses breaks down as follows:

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<sup>1</sup>The court may take judicial notice of prior bankruptcy petitions filed by a debtor when considering a subsequent petition. See In re: Jackson, 49 B.R. 298 (Bankr. Kan. 1985). See also Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (District Court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition).

Rent		\$500.00
Utilities		236.00
Food		570.00
Clothing		260.00
Laundry and Cleaning		105.00
Newspapers Periodicals and Books		50.00
Medical and Drug Expenses		125.00
Insurance		80.00
Transportation	150.00	
Recreation		120.00
Alimony, maintenance and support payments	475.00	
Other payments for support of dependents not living at home		100.00
Child care		110.00
Automobile lease payments		300.00

Even though no party in interest has objected to confirmation, this court has not only the right to inquire into the question of good faith, but the duty of making a case-by-case inquiry to determine whether a proposed Chapter 13 plan- meets the statutory criteria for confirmation under 11 U.S.C. §1325(a), including "good faith". In re: Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986); In re: Steele, 34 B.R. 172 (Bankr. M.D. Ala. 1983). The confirmation criteria under 11 U.S.C. §1325(a)(3) provides in pertinent part

(a) . . . , the court shall confirm if - . . .  
 (3) the plan has been proposed in good  
 faith . . .

Although a comprehensive definition of good faith is not practical, broadly speaking, the basic inquiry should be whether !under the circumstances of the case there has been an abuse of the provisions, purpose and spirit of Chapter 13 in the proposed plan. Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885 (11th Cir 1983). The Kitchens decision basically set forth 13 factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorneys fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;

7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayment; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885, 888 (11th Cir. 1983).

The application of the following Kitchen criteria to the facts of this case are critical in determining that the proposed plan fails to meet the confirmation criteria of good faith.

1. The amount of the debtor's income from all sources, the debtor's ability to earn and the likelihood of fluctuation in

earnings. The schedules reveal a current gross annual income into the household of Fifty-Four Thousand Four Hundred Thirty-Three and 42/100 (\$54,433.42.) Dollars. The schedules further reveal a total income into the household in 1987 of Seventy-Eight Thousand Three Hundred and No/100 (\$78,300.00) Dollars. Debtors have failed to adequately explain the projected shortfall in future earnings. Even with this reduction in income, the debtors in this case enjoy a comfortable income.

2. The living expenses of the debtor and dependents. Compared to the vast majority of debtors in this court, the debtors in this case are enjoying the "good life". By virtue of his occupation as an automobile salesman, debtor, Daniel T. Moraetes has use of an automobile and the proposed future monthly living expenses reveal that the debtor, Kathy B. Moraetes, proposes to assume an automobile lease with a Three Hundred and No/100 (\$300.00) Dollar monthly payment. The statement further reveals that they propose monthly expenditures of Two Hundred Sixty and No/100 (\$260.00) Dollars for new clothing, One Hundred Five and No/100 (\$105.00) Dollars for laundry and cleaning and One Hundred Twenty-Five and No/100 (\$125.00) Dollars for recreation. This, in conjunction with a Five Hundred and No/100 (\$500.00) Dollar per month rent payment, all suggests that the debtors in this case are not only living very comfortably, but propose to live too comfortably for debtors committed to the "spirit and purpose of Chapter 13 -- rehabilitation through repayment of debt, in dealing with their creditors." See,

In re: Hale, 65 L.R. 893 (Bankr. S.D. Ga. 1986), In re: Kitchens, 12 B.R. 654 (D.C. S.D. Ga. 1981).

3. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13. These debtors sought relief under Chapter 7, which relief was denied based upon a finding under 11 U.S.C. §707(b) that the filing constituted a substantial abuse of the bankruptcy process. In response to that dismissal, the debtors now seek relief under Chapter 13 and propose a minimal effort. The goal of the debtors in this case as in the Chapter 7 proceeding is the avoidance of repayment of debt, not rehabilitation and repayment.

4. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor. Debtor, Daniel T. Moraetes, was an unsuccessful Chapter XIII debtor, which previous case endured in excess of five (5) years before the court finally dismissed the proceeding based upon the failure of the debtor to make the called for payments to the trustee. The prior Chapter 7 proceeding was dismissed as a substantial abuse of the bankruptcy process. There is nothing before this court to indicate that this proceeding will have any better result, and from all appearances, is nothing more than a continuation of these debtors' bad faith dealing with their creditors through an attempted manipulation of the bankruptcy process.

5. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing

with his creditors. The previous Chapter 7 proceeding was dismissed in part based upon the failure of the debtors to reveal a pre-petition debt due to the employer of debtor Daniel T. Moraetes. The debtors continued to pay this debt during the pendency of the Chapter 7 proceeding and paid it out prior to refiling under Chapter 13. Clearly, the debtor in the initial Chapter 7 case preferred that creditor over the others and failed to disclose the debt and payment in his schedules.

None of the factors, standing alone, are sufficient to find that good faith is lacking; however, in consideration of all the factors, this court cannot conclude that the debtors' plan is proposed in good faith, and confirmation must therefore be denied. Debtors in this case have not demonstrated a commitment to the spirit and purpose of Chapter 13 rehabilitation and repayment. Chapter 13 affords a debtor the opportunity to set forth a plan to repay his debts to the extent possible in an orderly fashion from distribution from his future income while retaining his assets and maintaining a reasonable standard of living. Good faith requires more than minimal effort, which even minimal effort is lacking in this case. The Court of Appeals for the Eleventh Circuit articulated the responsibility of this court in conducting a confirmation hearing when it stated:

We hold that with 1325(a)(3) Congress intended to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is



incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.

The cornerstone of the bankruptcy courts has always been the doing of equity. The protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concepts of basic honesty. Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law.

In re: Waldron, 785 F.2d 936, 941 (11th Cir. 1986). See also, Flygare v. Boulden, 709 F.2d 1344, 1347 (10th Cir. 1983); U.S. v. Estus, 695 F.2d 311, 316-17 (8th Cir. 1982); In re: Rimgale, 669 F.2d 426, 431-32 (7th Cir. 1982).

IT IS THEREFORE ORDERED that confirmation of the debtors' plan is denied.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 9th day of June, 1989.